EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2012/0008

BETWEEN:

LYNDON DUNCAN

Appellant

and

EDISON BAIRD

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Tyrone Chong, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC, with him, Ms. Josephine Gumbs-Connor
and Ms. Yanique Stewart for the Appellant
Ms. Tara Carter-Ruan and Ms. Kristy Richardson for the Respondent

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2013: December 2;
2014: July 14.

Civil appeal – Defamation – Libel and slander – Fair comment – Qualified privilege – Whether words complained of could be reasonably considered as comment – Whether words attract qualified privilege

The respondent, a Minister of Government and an elected member of the Anguilla House of Assembly, commenced legal proceedings against the appellant for defamation for words spoken by the appellant at a public political rally (which was carried live on a local radio station). The respondent alleged that the words were understood to mean that he is lazy and is not functioning, that he and the Governor are part of a conspiracy, and that he does not have the country at heart and instead has used people to get elected for the money. The appellant, who, like the respondent, is a member of AUM, denied that the words were defamatory of the respondent and asserted that they were fair comment on a matter of public interest and/or were published on an occasion of qualified privilege.

The learned trial judge gave judgment against the appellant. The appellant appealed, asserting inter alia that the learned trial judge erred in concluding that the words complained of do not fall within what can reasonably be considered as comment and that the appellant had failed to prove the factual basis of the comment and had misstated the facts. Further, the learned judge misdirected himself on the evidence and/or erred in law in concluding that there was no duty - legal, social or moral - for the appellant to make the statements which he did.

Held: allowing the appeal and awarding prescribed costs in the appeal and in the court below, that:

1. A comment may contain an opinion, but it is not itself necessarily an opinion and there may be words spoken or written which constitute comment but which are neither expressions of opinion nor assertions of fact. A comment is often distinguished by the use of metaphors. The use of metaphors throughout the words complained of distinguish the words as comment and not statements of fact.

2. It is a defence to a claim of defamation that the words complained of are fair comment on a matter of public interest. It was an established fact that there was a proposed cut in Ministers' salaries by the AUM-led Government. Additionally, the respondent had conceded that he did not agree to the proposed salary cut. Having regard to the factual basis of the comment, the appellant's comment was one which might fairly be made out.

3. Defamatory words spoken or written in circumstances which attract qualified privilege and which were not proven to be actuated by malice are protected from liability. A privileged occasion is an occasion where the person who makes a communication has an interest, or a duty - legal, social or moral - to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. Having regard to the fact that the appellant was a member of the AUM who had an interest in the behaviour and performance of the respondent as a Legislator and Minister and had spoken words which were not proven to be actuated by malice, and having regard to the interest which party supporters and members of the Anguillan public who are likely to listen to speeches delivered at political rallies would have in the behaviour and performance of the respondent as Legislator and Minister, the occasion of the making of the statements by the appellant at the political rally would attract qualified privilege and the appellant would be protected by qualified privilege from liability for defamation.

   Adam v Ward [1917] AC 309 at 334 applied.

JUDGMENT

[1] MICHEL JA: The appellant and the respondent were at all material times members of the Anguilla United Movement ("AUM") - the governing party in the

British Overseas Territory of Anguilla. The respondent is and was at all material times an elected member of the House of Assembly and the Minister for Health and Social Development of Anguilla, having been elected to the House of Assembly as a member of the AUM at the general election in February 2010 and then appointed as a Minister on the advice of the leader of the AUM and Chief Minister of the Territory, Mr. Hubert Hughes.

[2] Between February 2010 and January 2011, relations between the respondent and other members of the AUM party and government had become strained to the point where the leader of the party and the government, Mr. Hubert Hughes, had advised the Governor to relieve the respondent of the health portfolio, which the Governor declined to do.

[3] On 8th January 2011, the AUM held a public political rally (which was carried live on a local radio station) at which the appellant addressed the assembled persons. In the course of his address, the appellant said:

> "I want to send the Honourable Minister, Mr. Edison Baird a strong message! You don't walk around like a chicken without a head out your body and get the people of Anguilla money, to do nothing. You think that you and the Governor can lie in bed and get away with it… when this Government went to office they decided to cut their salaries, you know what that Honourable Edison Baird said? "Don't cut my salary!" It's about money for him. It's not about his country and we had enough. You look at him, he walks around like he's in space. He's a disgrace to the people of Anguilla. He think it's all about getting elected. It is not! You don't use the people of Anguilla to get elected."

[4] On 3rd March 2011, the respondent instituted proceedings against the appellant for defamation, alleging that, in their natural and ordinary meaning, the words quoted above were understood to mean that the respondent is lazy and is not functioning, that he and the Governor are part of a conspiracy, and that he does not have the country at heart and instead has used people to get elected for the money. The respondent claimed damages, including exemplary damages, interest, costs, fees and other relief.

[5] In a defence filed on 11th April 2011, the appellant admitted that he spoke the words complained of, but denied that the words bore or were capable of bearing any of the meanings alleged by the respondent or any meaning defamatory of the respondent. The appellant also alleged that insofar as the words bore the meaning alleged by the respondent, the words were fair comment on a matter of public interest and/or were published on an occasion of qualified privilege.

[6] No reply was filed to the appellant's defence.

[7] Upon application made to the court under rule 69.4 of the Civil Procedure Rules 2000 ("CPR"), Master Mathurin ruled, by order dated 12th July 2011, that the words complained of were capable of bearing the meanings ascribed to them by the respondent.

[8] At the trial of the matter on 18th June 2012, the respondent gave evidence on his own behalf and called one witness, whilst the appellant gave evidence on his own behalf and called two witnesses. On 29th June 2012, the learned trial judge gave judgment against the appellant and ordered him to pay damages to the respondent in the sum of $40,000.00, together with prescribed costs on the amount awarded and interest from the date of judgment to the date of payment.

[9] By notice of appeal filed on 14th August 2012, the appellant appealed against the judgment of the learned trial judge on the following grounds:

> "1. The Learned Judge misdirected himself on the evidence and/or erred in law in concluding
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> (i) That the words complained of do not fall within what can reasonably be considered as comment.
>
> (ii) That there were no expressions of opinion within the said words.
>
> (iii) That the Appellant had failed to prove the factual basis of the comment and had misstated the facts.
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> 2. The Learned Judge misdirected himself on the evidence and/or erred in law in concluding that there was no duty legal, social or moral for the Appellant to make the statements which he did AND further that the Appellant had failed to satisfy the Reynolds test.

3. That the damages as awarded by the Learned trial Judge are excessive and the basis upon which the same were awarded was never pleaded or formed part of the evidence at trial."

[10] The appeal was heard on 2nd December 2013, with oral submissions made by counsel on behalf of the parties to augment the skeleton arguments/submissions filed by them.

[11] Defamation, at common law, is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society. To succeed in an action for defamation, therefore, a claimant must prove the making of a statement by a defendant tending to lower the claimant in the estimation of right thinking-members of the society and the publication of that statement to a third party or parties.

[12] On the facts of the present case, it was not disputed that the appellant made and published statements concerning the respondent, and the court ruled - by order of Master Mathurin dated 12th July 2011 - that the statements were capable of bearing the defamatory meanings ascribed to them by the respondent. The order of the learned master was not appealed and it therefore fell to the trial judge to determine whether the statements made by the appellant concerning the respondent were in fact such as would tend to lower the respondent in the estimation of right-thinking members of society. The trial judge made a factual determination on the evidence before him that the statements made by the appellant (in speaking the words complained of) did tend to lower the respondent in the estimation of right-thinking members of society, and this finding has not been appealed.

[13] As is apparent from the grounds of appeal, the appellant appealed against the legal and factual findings of the trial judge concerning the two defences to the tort of defamation run by the appellant in the court below, namely, fair comment and qualified privilege. The appellant's other ground of appeal was on the quantum of the award of damages.

[14] Taking first the ground of appeal relative to the defence of fair comment, the appellant contends that the trial judge misdirected himself on the evidence and/or erred in law in concluding that the words complained of do not fall within what can reasonably be considered as comment, that there were no expressions of opinion within the said words and that the appellant had failed to prove the factual basis of the comment and had misstated the facts.

[15] It is a defence to a claim of defamation that the words complained of are fair comment on a matter of public interest. The basis of this defence is stated by the authors of Gatley on Libel and Slander[1] to be that "[t]here are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice"."[2]

[16] As to the public interest element in this case, it does not appear to have been a matter of dispute that the words complained of, concerning the behaviour and performance in office of a Member of Parliament and a Minister of Government, were on a matter of public interest. These - according to the quoted extract from Gatley - "are matters on which the public has a legitimate interest or with which it is legitimately concerned". To ascertain whether the defence of fair comment is made out in this case, therefore, one has to determine whether the words complained of constitute comment (and not statements of fact) and, if so, whether the comment is fair, meaning, whether it is a comment which might fairly be made on the facts referred to.[3]

[17] The trial judge made particular factual and legal findings on these issues on which he based his judgment.

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[1] 10th edn., Sweet & Maxwell 2004.
[2] At para. 12.1.
[3] Sutherland and Others v Stopes [1925] AC 47 at 62; Burton v Board [1929] 1 KB 301 at 305.

[18] On the question of whether the words complained of constitute comment and not statements of fact, the trial judge stated, at paragraph 57 of his judgment, that:

> "It is settled law that the defence applies only to words recognisable as 'comment' in the sense of an expression of opinion and not mere assertions of fact. In this case I am unable to extract any expression of opinion from the words complained of."

And at paragraph 58 he stated:

> "The words complained of do not fall within the realm of what can reasonably be considered as comment. I find that there are no expressions of opinion within the words complained of in the case at bar and therefore the Defendant fails on the defence of fair comment."

[19] The approach taken by the trial judge on this issue amounts to an equation of comment with opinion and is in fact an over-simplification of the issue. A comment may contain an opinion, but it is not itself necessarily an opinion and there may be words spoken or written which constitute comment but which are neither expressions of opinion nor assertions of fact. Indeed, the only part of the words complained of which are capable of being interpreted as assertions of fact is the following – "when this Government went to office they decided to cut their salaries, you know what the Honourable Edison Baird said? Don't cut my salary." The remaining parts of the words complained of could only be considered as comment or (at most) inferences of fact from other facts referred to. How else do you treat with the remainder of the offending text which consists almost entirely of metaphors, such as, "you don't walk around like a chicken without a head out your body and get the people of Anguilla money to do nothing"; "you think that you and the Governor can lie in bed and can get away with it"; or "you look at him, he walks around like he is in space".

[20] As to metaphors in the law of defamation, the authors of Gatley on Libel and Slander state that "[i]t has been said that comment is often distinguished by the use of metaphor"[4] and indeed the use of metaphors throughout the brief passage

[4] At para. 12.8.

containing the words complained of certainly distinguish the words as comment and not statements of fact.

[21] The learned trial judge did therefore err in his characterization of the words complained of as not falling within what can reasonably be considered as comment and misdirected himself when he equated opinion with comment.

[22] I will come back to the question of whether the comment is fair, meaning whether it is a comment which might fairly be made on the facts referred to, but I want first to deal with the concluding paragraph of the learned judge's treatment of the issue of fair comment. At paragraph 63 of his judgment, the trial judge stated:

> "For the defence of fair comment to succeed, the Defendant must prove the factual basis of the comment to be true. The Defendant in this case has failed to do so. I am not satisfied that the Defendant honestly believed that the defamatory statements were true. In my view therefore the defence of fair comment does not avail the Defendant. That defence therefore fails."

[23] In terms of the statements of fact contained in the words complained of, it was established as a fact in the court below that when the AUM-led Government assumed office in February 2010 they decided to cut the salaries of Ministers and that the respondent was not in agreement with the salaries (or at least his salary) being cut. As to whether the respondent's disagreement was merely on the issue of the immediacy of the salary cut does not materially affect the factual basis of the comment made by the appellant to the effect that when the AUM-led Government assumed office in February 2010 they decided to cut the salaries of Ministers and that the respondent objected to this course of action. In fact, after persistent cross examination in the court below by learned Queen's Counsel for the appellant, the respondent conceded (at pages 50 and 51 of the transcript of the trial proceedings) that he did not agree to the salary cut when it was proposed upon the assumption of office by the AUM-led Government. I accordingly agree with learned Queen's Counsel for the appellant that the learned trial judge misdirected himself on the evidence and/or erred in law in concluding that the appellant had failed to prove the factual basis of the comment and had misstated the facts.

[24] As to the fairness of the comment relative to the facts referred to, it is to be noted that the trial judge never really made any assessment of or determination on the fairness of the comment, probably because he decided that the words constituted statements of fact and not comment, so it falls to this Court to make the assessment and determination.

[25] Having regard to the established fact of the proposed cut in Ministers' salaries by the AUM-led Government upon its assumption of office in February 2010 and the respondent's expressed opposition to the salary cut at the time that it was proposed, and having regard also to the particulars of facts on which the comment was made which are set out in the appellant's defence, it would appear that if the trial judge had undertaken the assessment and determination of the fairness of the comment by the appellant, he would have found (on a balance of probability) that the appellant's comment, even though harsh, was one which might fairly be made on the facts referred to.

[26] The defence of fair comment is defeated if it is shown that the comment was actuated by malice. But the onus is on the person seeking to defeat the defence of fair comment to establish malice. In the present case, the respondent did not plead malice, either in his statement of claim or in a reply to the appellant's plea of fair comment. In fact, the respondent did not even file a reply to the appellant's defence, and although there is an implied joinder of issue on the averments in a defence even if no reply is filed, where there is a specific plea in a defence which must be controverted in order to defeat the defence, the absence of any averment negativing that plea renders the plea unassailable. The requirement of a specific reply alleging malice when fair comment is pleaded in a defamation action is laid down by a practice direction under the English Civil Procedure Rules, but although not specifically set out in a practice direction under our Rules, it is both good sense and good law that a specific averment of malice would be required, either in the statement of claim or in a reply, in order to defeat a defence of fair comment which is otherwise made out.

[27] The issue of malice was not addressed in the judgment being appealed, although it was specifically addressed in the appellant's closing submissions. But it may be that the learned trial judge did not find it necessary to address it because he found that the words complained of were not comment and could not therefore give rise to the defence of fair comment and it was therefore of no consequence whether or not the appellant was actuated by malice. If the judge had addressed it though, he could only have found on the pleadings and the evidence that there was no allegation of malice made or proven by the respondent to have defeated the appellant's defence of fair comment.

[28] Before concluding the analysis and determination of the appellant's first ground of appeal, I should mention that in the earlier-quoted paragraph 63 of the judgment, the learned trial judge made the further error of comingling the issue of proving the factual basis of the comment made with the issue of the appellant's honest belief in the truthfulness of the statements made. These are two distinctly separate issues, the first concerning the nature of the words spoken by the appellant (whether fact or comment) and the second concerning the question of malice. These two issues have been separately addressed in the course of this judgment and need not be revisited.

[29] The several errors made by the trial judge in his treatment of the issue of the appellant's defence of fair comment caused him to arrive at an incorrect conclusion on this issue, with the result that the appellant's first ground of appeal is allowed.

[30] Having allowed the first ground of appeal it may be unnecessary to address the other two grounds but, for the sake of completeness, I propose to briefly address the other two grounds of appeal.

[31] The appellant's second ground of appeal is that the trial judge misdirected himself on the evidence and/or erred in law in concluding that there was no duty – legal, social or moral – for the appellant to make the statements which he did and that the appellant had failed to satisfy the Reynolds test.

[32] It is a defence to a claim of defamation that words defamatory of a person were spoken or written in circumstances which attract qualified privilege. The basis of this defence is stated by the authors of Gatley on Libel and Slander to be that:

> "There are circumstances in which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue. In such cases a person is protected if the statement was "fairly warranted by the occasion" (that is to say, fell within the scope of the purpose for which the law grants the privilege) and so long as it is not shown that the statement was made with malice, i.e. with some indirect or improper motive or knowing it to be untrue, or with reckless indifference as to its truth."[5]

[33] In dealing with the defence of qualified privilege in his judgment, the learned trial judge (at paragraph 66 of the judgment) quoted from Gatley on Libel and Slander and from the case of Adam v Ward.[6] The quotation from Gatley - which is itself a quotation from the judgment of Lord Esher MR in the case of Hunt v Great Northern Railway[7] – is as follows:

> "A privileged occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist the occasion is a privileged one."[8]

[34] The quotation from Adam v Ward, with the introductory words of Lord Atkinson added to it, is as follows:

> "… a privileged occasion is … an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."[9]

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[5] At para 14.1.
[6] [1917] AC 309 at 334.
[7] [1891] 2 QB 189 at 191.
[8] At para. 14.12.
[9] At p. 334.

[35] Having regard to these two judicial authorities quoted by the trial judge, and to the facts pleaded by the appellant clearly highlighting his interest (as a member of the AUM and a campaigner for the respondent and the AUM in the preceding general election) in the behaviour and performance of the respondent as a Legislator and Minister, and the obvious interest of party supporters and members of the Anguillan public who are likely to listen to speeches delivered at political rallies, in the behaviour and performance of the Legislators and Ministers, it is difficult to understand how the trial judge failed to find the co-existence or reciprocity of interests which would render the occasion privileged.

[36] The trial judge's discourse (in paragraph 67 of his judgment) on the appellant not being an elected member and on the appellant's evidence under cross examination that he was not a politician, or on his characterization of the appellant's address at the rally as being tantamount to a public flogging of the respondent, does not take away from the qualified privilege which the occasion of the appellant's speaking of the words would attract.

[37] The authors of Gatley on Libel and Slander state, at paragraph 14.4 of the tenth edition, that: "[s]tatements published on an occasion of qualified privilege are "protected for the common convenience and welfare of society". They then go on in the aforesaid paragraph 14.4 to flesh out this broad proposition by quoting from different cases on defamation.

[38] The first quotation comes from the judgment of Bankes LJ in the case of Gerhold v Baker[10], as follows:

> "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self) or common interest."

[10] [1918] WN 368 at 369.

[39] The second quotation comes from the judgment of Willes J in the case of Huntley v Ward[11], as follows:

> "In such cases, no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged, because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of private injury."

[40] The third quotation comes from the judgment of Lord Sands in the case of Dunnet v Nelson[12], as follows:

> "… it may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interests of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander."

[41] The fourth quotation comes from the judgment of Lord Coleridge CJ in Bowen v Hall[13], as follows:

> "It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded."

[42] The fifth and final quotation comes from the judgment of Willes J in Henwood v Harrison[14], as follows:

> "The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals."

[43] These statements of principle contained in the text and cases just quoted from leave no room for doubt that the words complained of, spoken by the appellant at the public rally of the AUM in January 2011, though they may have been defamatory of the respondent, were spoken on an occasion of qualified privilege

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[11] (1859) 6 CB (NS) 514 at 517.
[12] 1926 SC 764 at 769.
[13] (1881) 6 QBD 333 at 343.
[14] (1872) LR 7 CP 606 at 622.

and that, absent any malice by the appellant, he is protected by qualified privilege from liability for defamation.

[44] As to the absence of malice, the position with respect to the defence of qualified privilege is the same as it is with the defence of fair comment – proof of malice defeats the defence. The position is also the same with respect to the pleading and proving of malice. No malice was pleaded or proved in this case to negative a defence of qualified privilege and the issue was not addressed by the trial judge in the course of his judgment, probably because he made a determination that the defence of qualified privilege was not made out on the facts of the case and so there was no need to address the issue of whether it was defeated by malice. But if the trial judge had addressed the issue of malice in the context of qualified privilege, he could only have found that on the pleadings and the evidence there was no allegation of malice made or proven by the respondent to defeat the appellant's defence of qualified privilege.

[45] Still on the appellant's second ground of appeal, the trial judge's finding (at paragraph 67 of his judgment) that "[the appellant] does not satisfy the test set out in Reynolds; hence, the defence of qualified privilege fails" reveals a misunderstanding of the Reynolds case and a misapprehension as to its applicability to cases like the present one.

[46] The duty-interest test propounded by the House of Lords in Reynolds v Times Newspapers Ltd [15] was intended to apply to the publication of information via the media and in fact is nicknamed "the responsible journalism test". The appellant in this case was not a journalist or a person speaking or writing something for publication via the news media. He was a party member and campaigner commenting (harshly it would seem) on the behaviour and performance in public office of a member of his party elected and appointed as such to be a Legislator and Government Minister in the Territory of Anguilla. If he can establish that he had an interest, as a party member and campaigner, in communicating information

[15] [2001] 2 AC 127.

about the behaviour and performance of members of his party elected to the Legislature and appointed to the Cabinet, and that the attendees at a political rally hosted by the party had a corresponding or reciprocal interest in receiving that information, then he has made out his defence of qualified privilege.

[47] On the facts of this case, the appellant established his interest (as a party member and an election campaigner for the party) in communicating information to party members and supporters about the behaviour and performance of the respondent (as a party member elected to the Legislature and appointed to the Cabinet) and also established that the party members and supporters had an interest in receiving that information, he is therefore entitled, with no malice having been pleaded or proved against him, to avail himself of the defence of qualified privilege.

[48] The appellant's second ground of appeal is accordingly allowed.

[49] The appellant's third ground of appeal is that the damages awarded by the learned trial judge are excessive and the basis upon which the same were awarded was never pleaded or formed part of the evidence at trial.

[50] This ground of appeal was not vigorously pursued by the appellant and no authorities were produced by him in support of the argument that the award of $40,000.00 was excessive. In fact, kindred cases involving defamatory statements made about Government Ministers in the Eastern Caribbean in the course of the last decade have generated awards at or above the quantum of the award in this case. If, therefore, it was necessary for me to make a determination on the quantum of the damages award made by the trial judge in this case, I would not be inclined to interfere with the amount awarded by the learned trial judge.

[51] The appellant's third ground of appeal is accordingly dismissed.

[52] The first and second grounds of appeal having been allowed, the appeal is allowed and the order of the trial judge is set aside.

[53] The appellant is awarded his costs here and in the court below, which costs shall be prescribed costs in accordance with rules 65.5 and 65.13 of the CPR.

Mario Michel
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Tyrone Chong, QC
Justice of Appeal [Ag.]